March 22, 2017

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Petition for Rulemaking and Declaratory Ruling Filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278, CG Docket No. 05338

Dear Ms. Dortch:

The National Council of Higher Education Resources ("NCHER") submits reply comments in connection with the Petition for Rulemaking and Declaratory Ruling (the "Petition") filed with the Federal Communications Commission (the "Commission") by Craig Moskowitz and Craig Cunningham (the "Petitioners").

NCHER is a national, nonprofit trade association representing higher education service agencies that administer education programs that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our membership includes organizations under contract with the U.S. Department of Education to service and recover outstanding loans made under the Federal Direct Loan Program and organizations that service and recover outstanding loans made under the Federal Family Education Loan Program. As part of their recognized role in assisting student loan borrowers avoid delinquency or get out of default, our members have a need to communicate with consumers on a regular basis.

The Telephone Consumer Protection Act of 1991 ("TCPA") states that persons who wish to make a call to a cellular telephone using automated telephone dialing equipment or leaving an artificial or prerecorded voice message must first obtain the "prior express consent" of the called party (§§ 227(b)(1)(A)(iii), 227(b)(1)(B))[1]. The Commission issued an order in 1992[2] ("1992 Order") that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary," and in 2008[3] (the "2008 Order) that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at

[1] These provisions are codified at 47 U.S.C. 227(b)(1)(A)(iii) and 47 U.S.C. 227(b)(1)(B).
[2] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, CC docket no. 92-90, FCC-92-443 (rel. October 26, 1992).
[3] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, CG docket no. 02-278, FCC-07-232 (rel. Jan. 4, 2008).

that number regarding the debt." Petitioners request that the Commission initiate a rulemaking to (a) overturn the Commission's interpretation that "prior express consent" includes consent resulting from a party's providing a telephone number to the caller; and (b) require that for all calls made to cellular and residential lines subject to the TCPA's prohibitions in sections 227(b)(1)(A)(iii) and 227(b)(1)(B), "prior express consent" to such telephone calls must actually be (i) express consent (ii) specifically to receive autodialed and/or artificial voice/prerecorded telephone calls, (iii) at a specified telephone number, and (iv) be in writing.

In short, for the reasons set forth below, NCHER supports the comments filed with respect to the Petition by the Student Loan Servicing Alliance, the U.S. Chamber Institute for Legal Reform, the American Financial Services Association et al., ACA International, and others who filed comments in opposition to the Petition. We also oppose the comments filed by the National Consumer Law Center.

A. The TCPA Does Not Require that a Consumer's Consent Request Must Be in Writing

One of Petitioners' main requests is that any consent provided by a consumer be in writing. However, such a requirement is not included in the TCPA. When Congress passed the law in 1991, it chose not to require written consent. When Congress last amended the law through the Bipartisan Budget Act of 2015, it again chose not to require written consent for calls to cellular or residential lines. The fact that the TCPA does not say that a consumer's consent must be in writing should be dispositive to that part of the issues raised by the petitioner. In fact, Petitioners acknowledge that the Commission has the power to allow consent to autodialed and artificial voice/prerecorded calls to be obtained orally[4], thus undercutting their request.[5]

B. The Petition Seeks to Reverse Long-Standing Interpretations of the TCPA

The Petition seeks to overturn long-standing interpretations by the Commission, which set the standards of what constitutes express consent for the purposes of sections 227(b)(1)(A) and (B) of the TCPA. The 1992 Order and 2008 Order are consistent with the statutory language and set reasonable standards for what constitutes express consent. By orally consenting to be called, a consumer is taking an express action evidencing consent to being called. The same is true when a consumer expressly provides his or her number to a creditor or other party. This legal framework for determining whether express consent has been obtained is well settled. Contrary to the position taken by the Petitioners, the 1992 Order and 2008 Order do not "eviscerate Congress's requirement that a caller obtain 'prior express consent'."[6] In fact, they reflect and acknowledge modern day modes of communication. The Petition does not provide any convincing reason to overturn the existing interpretations that go back as long as 25 years – and in our view there are none.

C. The Policies Reflected in the 1992 Order and 2008 Order Are Reasonable

A functioning credit system depends on borrowers repaying their financial obligations to their creditors. Many borrowers need to be reminded of their loans and, in fact, any reasonable borrower would expect to be contacted if a required payment is not made. When borrowers provide their mobile phone number to a creditor and/or its servicing or collection agent, either as part of a loan application or other loan document or during a telephone conversation, the borrowers should expect that those parties will use the number to contact them should the need arise.

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[4] Petition, p. 4.

[5] The Commission in 2012 ruled that express consent for informational, non-telemarketing calls can be provided orally. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CG docket no. 02-278 (rel. February 15, 2012).

[6] Petition, p. 16.

Further, it is reasonable to assume that, when a consumer consents to be called at a specific number, he or she is also consenting to being called at subsequent numbers the consumer owns. Today, it is common for consumers, particularly younger consumers, to change their phones and numbers periodically. Commissioner Michael O'Rielly stated, in his dissent to the Report and Order released August 11, 2016, that 100,000 numbers are recycled every day.[7] He also specifically described how this phenomenon impacts student loan participants stating, "I expect that a particularly high percentage of numbers will have changed hands between the time that student loan borrowers, for example, take out loans when they start school, when they graduate and actually begin to repay the loans, and when they finally pay them off."[8] NCHER members deal on a daily basis with frequent changes in residential and mobile numbers of their customers. Under Petitioners' request, the express consent given by a borrower at the time he or she applies for a loan would not transfer over to a subsequent number owned by the consumer. This would establish an almost insurmountable barrier to successful loan servicing and collection.

Thus, the Commission in issuing the 1992 Order and 2008 Order adopted common-sense interpretations. These interpretations resonate strongly in the context of informational non-telemarketing calls to administer and service debt, including debt collection.

D. The Petitioners' Requests Would End Up Hindering Constructive and Beneficial Communication with Student Loan Borrowers

Communication is critically important in the context of the servicing and collection of student loans and ensures that borrowers do not unintentionally and unnecessarily suffer the consequences of delinquency and default. For loans made under the federal student loan programs,[9] over the last 10 years, Congress and the U.S. Department of Education (the "Department") have created a number of attractive borrower benefits such as multiple repayment plans and the loan rehabilitation program. These initiatives are designed to address personal circumstances and help borrowers who are struggling to meet their payment obligations. However, servicers and collectors frequently need to talk to the borrowers to inform them of the benefits that are available under the Higher Education Act. Live communication with the borrower is critically important, which is a key reason why the Department specifically added express borrower consent to be called language to the Federal Student Loan application and supporting documents.

NCHER has described and detailed these programs in filings to the Commission, most recently in connection with comments filed on June 6, 2016 in response to the May 6, 2016 Notice of Proposed Rulemaking (the "NPRM") seeking comments on the Commission's proposal to prescribe regulations to restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service for the purpose of collecting a debt owed to or guaranteed by the United States. We also detailed the programs in supporting comments filed on February 1, 2017 in connection with the Petition filed by Great Lakes Higher Education Corp., Navient Corp., Nelnet, Inc., Pennsylvania Higher Education Assistance Agency, and the Student Loan Servicing Alliance for reconsideration of the Report and Order released August 11, 2016, which finalized the NPRM. For example, payments on federal student loans can be deferred for borrowers who return to school, are unemployed, or are otherwise experiencing a financial hardship. Once in repayment, borrowers have a large number of options. They

[7] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, CG docket no. 02-278 (rel. August 11, 2016), p. 57.

[8] Id., pp 57-58.

[9] Approximately 93 percent of all outstanding student loans were made under the federal student loan programs, including the William D. Ford Federal Direct Loan Program, the Federal Family Education Loan Program, and the Federal Perkins Loan Program.

can make fixed payments based on a 10 year repayment period, a 10-to 30-year repayment period, graduated payments that increase over time, or payments based on their current income. While eligibility requirements differ for each income-driven repayment ("IDR") plan, borrowers' monthly payments can be as low as zero and the borrowers can have their balances that remain after a period (varying from 10 to 25 years) forgiven. Unfortunately, many borrowers fall into delinquency without accessing these complex options. The Department has made clear that when borrowers fall into delinquency, federal student loan servicers must be able to proactively reach out to make them aware of their options and to help them access the repayment plan that best suits their needs.[10]

Importantly, if a borrower nonetheless defaults on a federal student loan, the Department's loan rehabilitation program allows him or her to "rehabilitate" that loan by making nine timely and voluntary "reasonable and affordable" monthly payments over a 10-month period, where payments can be as low as $5 per month. Successful rehabilitation removes a loan from default status and erases the record of default from the borrower's credit report. Individuals who rehabilitate their loans also regain all of their rights under the federal financial assistance programs, including eligibility for new loans and grants if they go back to school. Student loan collectors and guaranty agencies must be able to reach and talk to struggling borrowers about the importance of the loan rehabilitation program as an effective tool to help get them back into good standing.

In the student loan context, communication is the key to successful resolutions, both in the case of pre-default servicing and for post-default collection. The most effective mode of communication, particularly for borrowers who are having difficulties, is to have a phone conversation. The position taken by the Petitioners would result in significant barriers being placed between borrowers and those organizations that can actually help them stay out of delinquency and default.

E. Conclusion

The Commission's long-standing interpretations of what constitutes express consent are grounded in common-sense and should not be overturned through the Petition. In the areas of loan servicing and collection, there needs to be a balancing of interests, which also includes the integrity of the credit system. The current legal framework for determining whether a borrower has consented to communication strikes a reasonable balance. For these reasons, the Petitioners' requests should be rejected and the Petition dismissed.

Thank you for the opportunity to provide comments on the Petition. If you have questions or would like additional information, please contact me at jbergeron@ncher.us or (202) 822-2106.

Sincerely,

James P. Bergeron
President

[10] Memorandum on Policy Direction on Federal Student Loan Servicing from Ted Mitchell, Under Secretary of Education, p. 14 (Rel. July 20, 2016).